

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 89-552

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Provide
for the Use of the 220-222 MHz
Band by the Private Land Mobile
Radio Services

FURTHER NOTICE OF PROPOSED RULE MAKING

Adopted: January 21, 1992; Released: January 30, 1992

Comment Date: March 2, 1992

Reply Comment Date: March 23, 1992

By the Commission:

I. INTRODUCTION

1. We are issuing this *Further Notice of Proposed Rule Making* to solicit the public's views regarding the best available means for selecting licensees for the 220-222 MHz nationwide authorizations. Specifically, commenters are requested to address whether the use of comparative hearings is preferred to random selection as a mechanism for determining which nationwide applicants are best qualified to become licensees. Commenters are also asked to discuss whether the distinctions between the nationwide commercial and non-commercial set-asides¹ render any particular selection procedure preferable in either context. Finally, we are proposing certain general criteria to be used in the event that we choose to employ com-

parative selection procedures. Commenters are requested to discuss the utility of these criteria as well as to suggest additional criteria designed to identify the best qualified applicants.

II. BACKGROUND/DISCUSSION

2. In the *Notice of Proposed Rule Making and Report and Order* adopted in this proceeding, we concluded that the lottery process was the best available alternative for the selection of licensees.² In substantial part, this decision was premised upon our view that, because of the difficulty inherent in attempting to devise meaningful comparative criteria where private land mobile services are involved, the time and expense associated with comparative hearings would not likely produce a result more enlightened or more in the public interest than selection via lottery.³ Because we recognized that an undesirable characteristic of lotteries is their appeal to speculators, we took several steps designed to minimize the number of speculative applications filed, and thus to restrict lottery entry to entities with legitimate communications plans.⁴ Nevertheless, we received approximately 60,000 applications, the majority of which are for the local channels.⁵ In our view, the considerable number of applications filed demonstrates that despite the adoption of measures specifically designed to prevent such a result, the 220-222 MHz lottery was perceived as a "treasure hunt" by a number of entities that have no apparent legitimate interest in developing and operating communications systems.⁶

3. In light of the above, we have been prompted to reexamine our decision and to consider whether the use of comparative hearings would be advantageous in guaranteeing that only the most qualified entities are selected for the nationwide 220-222 MHz authorizations. Although the number of local applications filed leads us to believe that the principal amount of speculation occurred at the local level, we remain convinced that the substantial similarities between the proposed systems of local applicants make it impracticable to attempt to compare their relative qualifications.⁷ Moreover, in view of the volume of local applications filed and the small amount

¹ Commercial nationwide licensees will be permitted to provide entrepreneurial communications service to any Part 90 eligible. Non-commercial licensees, in contrast, will be permitted to use the nationwide system only for their own internal communications purposes.

² Notice of Proposed Rule Making, PR Docket No. 89-552, 4 FCC Rcd 8593, 8599 (1989); Report and Order, 6 FCC Rcd 2356, 2365 (1991) [hereinafter *Report and Order*].

³ *Report and Order*, 6 FCC Rcd at 2365.

⁴ For example, for nationwide applicants, we adopted rules (1) prohibiting a person or entity from holding any interest in mutually exclusive applications; (2) requiring the submission of certified financial data showing that the applicant has the finances to construct 40 percent of the system and operate it for four years; (3) imposing stringent construction requirements; and (4) prohibiting license transfers and the leasing of excess capacity until certain specified conditions have been satisfied. With respect to the local channels, we adopted cross-ownership and construction requirements similar to those adopted for the nationwide authorizations. For example, we require that licensees must construct and have local systems in operation within eight months of the license grant, and we prohibit license transfers until the facilities are fully constructed.

⁵ Of the nearly 60,000 applications filed, only 174 are for nationwide authorizations.

⁶ Our alarm with regard to speculative filings is particularly acute because of our recent experience in the 900 MHz private land mobile context. Specifically, our records reflect that in response to the allocation of channels in the 900 MHz band for use by Specialized Mobile Radio systems (SMRs), we received 58,480 applications for 920 possible license grants. Of the 822 SMR licenses granted, 265 have been cancelled for failure to meet the Commission's construction requirements.

⁷ See *In re Amendment of Part 22 to Provide for Filing and Processing of Applications for Unserved Areas in the Cellular Service*, CC Docket Nos. 90-6, 85-388, 69 RR2d 1277 (1991) (comparative hearings are particularly ill-suited where the differences between applicants and their proposed systems are relatively negligible); see also *In re Amendment of the Commission's Rules to Allow the Selection from Among Mutually Exclusive Competing Cellular Applications Using Random Selection or Lotteries Instead of Comparative Hearings*, CC Docket No. 83-1096, 98 FCC 2d 175, 186 (1984) (same), *modified*, 101 FCC 2d 577, *further modified*, 59 RR2d 407 (1985), *aff'd in part and rev'd in part*, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C. Cir. 1987).

of spectrum associated with each local license, it would be markedly inefficient for us to devote our resources to the comparative evaluation of local applicants.

4. In contrast, the potential value of the nationwide authorizations, the small number of nationwide licenses available, and the amount of spectrum associated with each nationwide license cause us to question whether the public interest would be better served by the use of procedures more exacting than the lottery process to select nationwide applicants. Consequently, we solicit commenters' views regarding the best means, using the tools currently available to us, to ensure that only the most qualified entities are selected for nationwide licensing. Specifically, commenters are requested to address the relative advantages and disadvantages of comparative procedures as opposed to random selection, and to discuss the likelihood that comparative hearings will successfully identify significant distinctions between applicants and their ability to use the nationwide authorizations effectively. Commenters are also requested to discuss whether the benefits of employing comparative procedures to select nationwide licensees outweigh the cost and time associated with the comparative hearing process. In particular in this regard, we solicit comment with respect to the administrative workability of using comparative procedures to evaluate the number of applicants seeking nationwide licensing, and request commenters' views as to the best means, from an administrative standpoint, for conducting comparative proceedings.

5. As indicated, we also seek comment with respect to whether the distinctions between the nationwide commercial and non-commercial authorizations cause a particular selection process to be more or less suitable in either context. For example, commenters are asked to address the significance of the fact that the commercial nationwide authorizations will be available to the licensees' numerous customers, whereas the noncommercial channels will be used almost exclusively by four single entities for the purpose of satisfying their internal nationwide communications needs, and to discuss whether this or any other characteristics unique to either set-aside render selection via lottery or comparative procedures particularly appropriate.

6. In addition, in recognition of the special status of the non-commercial nationwide channels, we solicit comment as to the efficacy of adopting stricter operating and construction standards as a means for narrowing the non-commercial pool of applicants to only those entities with the greatest interest and demonstrated capability to develop a non-commercial nationwide communications system. In particular, commenters are asked to discuss the merits of rule changes that would (1) require nationwide

non-commercial licensees to construct at least one base station in a minimum of 70 markets within five rather than ten years of licensing;⁸ and (2) require applicants for nationwide non-commercial licensing to demonstrate an actual presence or long-term business plan that necessitates internal communications capacity in the 70 or more markets identified in the license application. Commenters favoring the imposition of a requirement that applicants demonstrate an actual presence or long-term business plan necessitating internal communications capacity in 70 or more markets are further requested to suggest a methodology for making this showing. Although we believe the adoption of the rule changes set forth in the preceding paragraph would be useful in conjunction with either random selection procedures (as entry criteria) or comparative hearings (as additional basic qualifications),⁹ commenters are asked to discuss whether, in their view, the strengthening of the construction and operational requirements would be more effective in the context of a particular form of selection procedure.¹⁰

7. In the event that we decide to use comparative selection procedures in either the commercial or non-commercial nationwide context or both, we propose to adopt specific comparative criteria that will focus on the following three general areas: (1) the applicant's ability to demonstrate that it can provide service more quickly than required by the basic qualifications; (2) the applicant's ability to construct more than the minimum of one base station in a greater number of geographic areas than the 70 required as a basic qualification; and (3) the applicant's ability to demonstrate that its proposed use or system design is exceptionally innovative or proficient. Under the first of these three criteria, we propose to require applicants to submit documentation reflecting that they have a firm financial commitment and business plan that will allow them to construct and operate base stations sooner than required under the basic qualification construction benchmarks.¹¹ Similarly, an applicant seeking comparative credit for providing expanded service pursuant to the second factor set forth above would be required to submit an additional financial showing demonstrating that it will in fact be able to serve additional markets. We also propose to provide comparative credit under the second general area to an applicant able to demonstrate that its system can readily expand service within a market to satisfy growing service demand and expansions in population.¹² Applicants seeking to obtain comparative credit under the third factor, technological innovation, would also be credited for prior experience in operating communications systems or manufacturing communications

⁸ The rule adopted in the *Report and Order* contains a 10-year construction requirement. See 47 C.F.R. § 90.725(a).

⁹ If we decide to use comparative procedures to select nationwide licensees, the entry criteria adopted in the *Report and Order*, see, e.g., 47 C.F.R. §§ 90.713, 90.725, would serve as basic qualifications each applicant would be required to meet.

¹⁰ We also ask commenters to discuss whether application filing fees should be refunded to applicants for nationwide commercial or non-commercial authorizations who, in light of any rule changes stemming from this proceeding, voluntarily withdraw prior to commencement of the selection process. In this connection, we note that we interpret 47 C.F.R. § 1.1111(a)(4) to

permit us to refund the application fees paid by any such entity.

¹¹ See 47 C.F.R. § 90.725. We propose to require applicants seeking comparative credit to produce a new accelerated construction schedule. Applicants seeking comparative credit for expedited construction would be required to fulfill the new construction obligation or forfeit their license and all construction completed to that point.

¹² A similar criterion was adopted when the Commission used comparative procedures in the cellular context. See, e.g., An Inquiry into the Use of the Bands 825-845 and 870-890 MHz for Cellular Communications Systems, CC Docket No. 79-318, FCC No. 81-161, 86 FCC 2d 469, 502-03 (1981).

equipment in a manner indicative of their ability to operate effectively a nationwide system of the type proposed.¹³

8. We request commenters to discuss the effectiveness of these three general areas of focus in terms of the likelihood (that they will produce meaningful distinctions between applicants as well as their administrative workability. Commenters are also requested to discuss whether different comparative criteria should be formulated for the commercial and non-commercial channels. For example, the ability to provide service to expanded areas of population may be a criterion of little utility in the non-commercial setting. By the same token, it may be useful in the non-commercial context to give comparative credit to applicants able to demonstrate that their proposed communications plan will be of value to their business by causing quantitative increases in efficiency and productivity. Furthermore, although we propose that each comparative factor be given equal weight, we solicit commenters' views as to whether certain criteria should be weighed more heavily than others. In addition, commenters are asked to set forth their views as to how applicants should be required to make the various showings needed to obtain comparative credit pursuant to each factor set forth above, and to suggest any additional criteria that will be of assistance in identifying the best qualified applicants. Finally, we request commenters to suggest a methodology for the assignment of comparative credits in a manner that takes into account various combinations in the three areas of focus. Specifically, commenters are asked to discuss the feasibility of designing a method that will reduce the various criteria to a single common denominator or ranking procedure, thereby permitting meaningful comparison.

III. CONCLUSION

9. In summary, we are issuing this *Further Notice of Proposed Rule Making* to solicit commenters' views and to create a record for ascertaining the best means within our statutory authority for selecting nationwide 220-222 MHz licensees. In addition, we take action proposing general comparative criteria to be used in the event that comparative selection procedures are chosen. An appendix reflecting the proposed rule changes is attached.

IV. PROCEDURAL MATTERS

Ex parte Rules - Non-Restricted Proceeding

10. This is a non-restricted notice and comment rule making proceeding. *Ex parte* presentations are permitted except during the Sunshine Agenda period, provided that they are disclosed as provided in the Commission's Rules. See generally 47 C.F.R. §§ 1.1202, 1.1203, 1.1206(a).

Initial Regulatory Flexibility Analysis

11. We certify that the Regulatory Flexibility Act of 1980 does not apply to this proceeding. Any action taken as the result of this *Further Notice of Proposed Rule Mak-*

ing is unlikely to have a significant economic effect on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act, because the significant capital expenditures involved in applying for the 220-222 MHz nationwide authorizations generally renders these channels suitable only for large enterprises. The Secretary shall send a copy of this *Further Notice of Proposed Rule Making*, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act. Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. § 601 *et seq.* (1981).

Comment Dates

12. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415, 1.419, interested parties may file comments on or before **March 2, 1992**, and reply comments on or before **March 23, 1992**. To file formally in this proceeding, you must file an original and five copies of all comments, reply comments, and supporting comments. If you wish for each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the Dockets Reference Room of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

13. For further information concerning this proceeding, contact Karen Kincaid, Private Radio Bureau, Room 5202, Federal Communications Commission, Washington, D.C. 20554, telephone (202) 634-2443.

14. Authority for issuance of this *Further Notice of Proposed Rule Making* is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 303(r).

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX

47 C.F.R. Part 90 is proposed to be amended as follows:

1. The authority citation for Part 90 continues to read as follows:

Authority: Sections 4, 303, 48 Stat. 1066, 1082, as amended; 47 U.S.C. 154, 303.

2. 47 C.F.R. § 90.711 is amended by revising paragraph (a) to read as follows:

¹³ Commenters are asked to set forth specific proposals as to how an applicant's prior experience should be given comparative credit. For example, we request commenters to discuss

whether a point credit system is appropriate for this criterion and, if so, how points would best be awarded.

§ 90.711 Processing of applications.

(a) Applications will be processed on a first-come, first-served basis. When multiple applications are filed on the same day for frequencies in the same geographic area, and insufficient frequencies are available to grant all applications (i.e., if all applications were granted, violation of the provisions of § 90.723(f) of this part would result), or when multiple applications for nationwide systems are filed on the same day for a number of systems in excess of those available in the relevant category (10-channel non-commercial, 5-channel non-commercial or 5-channel commercial), these applications will be considered mutually exclusive. All mutually exclusive nationwide applications will be resolved through the use of comparative procedures.

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3. 47 C.F.R. § 90.713 is amended by adding paragraph (a)(6) to read as follows:

§ 90.713 Entry Criteria.

(a) * * *

(6) Applicants for non-commercial nationwide licensing must also submit a written certification demonstrating an actual presence or long-term business plan necessitating internal communications capacity in the 70 or more markets identified in the license application.

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4. 47 C.F.R. § 90.725 is amended by revising paragraph (h) to read as follows:

§ 90.725 Construction requirements.

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(h) Licensees granted non-commercial nationwide authorizations will be required to construct base stations in a minimum of 70 markets designated in the license application within five years of the initial license grant.